Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 193.

FORD MOTOR COMPANY,

Petitioner,

vs.

GEORGE HUFFMAN, individually, and on behalf of a class, etc., *et al.*

No. 194.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, etc.,

Petitioner,

vs.

GEORGE HUFFMAN, individually, and on behalf of a class, etc., *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF CHRYSLER CORPORATION, *AMICUS CURIAE.*

NICHOLAS KELLEY,
FRANCIS S. BENSEL,
T. R. ISERMAN,
HANCOCK GRIFFIN, JR.,
Counsel for Chrysler Corporation, Amicus Curiae,
70 Broadway,
New York, N. Y.

THE COURT PRESS, N. Y. C.

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Chrysler Corporation, as an *amicus curiae,* submits this brief in support of the appeals of Ford Motor Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO. Pursuant to Subdivision 9 of Rule XXVII of the Rules of this Court, Chrysler has obtained consent of all the parties hereto to the submission of this brief.

We do not believe this Court should substitute long after the event what it thinks should have been the parties' agreement on seniority when the parties were not under any obligation to enter into any particular kind of agreement on seniority, or for that matter, any agreement on the subject at all.

CONCLUSION.

We submit that the order appealed from should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

NICHOLAS KELLEY,
FRANCIS S. BENSEL,
T. R. ISERMAN,
HANCOCK GRIFFIN, JR.,
Counsel for Chrysler Corporation, Amicus Curiae.

ARGUMENT.

I.

The ruling of the Court of Appeals undermines the whole scheme of the National Labor Relations Act, as amended, and would make impracticable, if not impossible, the kind of collective bargaining that the Act requires.

The remedy of the Respondent employees lies in proceedings in their own union to bring about a change in the seniority clauses, or under the National Labor Relations Act to change their bargaining representatives, not by collateral attack in court on a long-standing, lawful clause of contracts negotiated many years ago pursuant to said Act.

Section 9 (a) of the National Labor Relations Act provides that representatives whom the majority of the employees in an appropriate bargaining unit designate,

> "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; . . . ." (29 U. S. C., Sec. 159.)

Section 8 (a) (5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Section 10 empowers the National Labor Relations Board and the courts to force employers to bargain with representatives of their employees.

In passing the Act, Congress did two new and unique things.

First, it gave to labor organizations authority that no law gives to other voluntary associations, namely, authority to bind people who are not members of these organizations, regardless of the wishes of such people, and even to their detriment.

In *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332 (1943), this Court discussed the nature of collective agreements under the National Labor Relations Act, saying at pages 338-9:

> "But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account . . . . The practice and philosophy of collective bargaining looks with suspicion on such individual advantages . . . . The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result . . . ."

Second, Congress imposed on employers a statutory duty to bargain with the exclusive representatives. Ordinarily, the right to refuse to deal is an essential element of bargaining. Thus Congress made compulsory a process that in all other connections is essentially voluntary. Employers must recognize the exclusive representatives, must bargain with them and

must try earnestly to reach agreement. *Labor Board v. Sands Mfg. Co.*, 306 U. S. 332 (1939).

Congress allowed to collective bargainers the utmost latitude in selecting the subjects on which they could bargain and decide. This was necessary under the scheme that Congress set up. It would be anomalous indeed for Congress to give to a union on the one hand exclusive bargaining power and to require an employer, on the other, to bargain with that union, and yet to say, as the Court of Appeals would have it say, that the validity of the bargain must await a ruling from some Court or other body. If this had been the intent of Congress, it would have said so.

If the holding of the Court of Appeals be correct, then the National Labor Relations Act as amended does not mean what it says and what the courts without exception have held it says. The Court of Appeals has held that the union is not the exclusive representative of employees, but merely a preliminary negotiator, with the courts holding the final and exclusive power to say ultimately what the bargain may be. The employer, in this event, although required to bargain in good faith, can never know that the bargain he makes will be valid. He would be forced to go through an always serious, often difficult and sometimes painful ordeal with the knowledge that an individual employee may upset that bargain which presumably, the majority of the members of the "exclusive" representative ratified.

There Was No "Discrimination" Here of a Kind That the Law Condemns.

Congress imposed no limits on the subjects concerning which unions and employers may bargain, or

on the bargain they may reach, except one. The exception is that neither may use the bargain, otherwise than by agreeing to a valid clause compelling membership in the union, to discriminate among employees on the basis of union membership or activity. 29 U. S. C. Secs. 158 (a) (3) and (b) (2). See, for example, *Wallace Corp.* v. *Labor Board*, 323 U. S. 248 (1944). The instant clause obviously had no such purpose.

This Court has engrafted another exception, holding that, in certain circumstances, a union may not enter into a bargain that discriminates against employees' inherent rights. In *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 (1944), this Court struck down the contract between the union and the employer which discriminated against negro firemen. But that decision is irrelevant here. In that case, the discrimination involved inherent rights. The present case involves rights that exist only by contract, and only in accordance with the terms of the contract.

Furthermore, in the *Steele* case, negroes whom the union excluded as members and against whom it discriminated because of their race had no voice in its affairs. Mr. Justice Stone emphasized this circumstance at pages 199-202. Here, membership in the respondent union was available to all the plaintiffs. Indeed, the complaint alleges they are members. (R. 3).

We find no case or statute forbidding unions and employers to "discriminate" as between different groups or classes of employees on grounds that do not encourage or discourage union membership or activity or that do not violate inherent rights; and they frequently do discriminate on other grounds.

The Court of Appeals uses the word "discriminate" as though, in all cases, discrimination is evil. This is not so, either in law or in common usage. Webster's International Dictionary, Second Edition, says "to discriminate" means:

> "To serve to distinguish; to mark as different, to differentiate.
>
> "To separate (like things) one from another in comprehension or use by discerning minute differences.
>
> "To make a distinction; to distinguish accurately; as to discriminate between fact and fancy; also to use discernment.
>
> "To make a difference in treatment or favor (of one as compared with others); as to discriminate in favor of one's friends; to discriminate against a special class."

The term "discriminate" standing alone is ambiguous. Unless we know the grounds of the discrimination, we cannot judge whether it is proper or improper. Differentiation in good faith, not in a way that the law forbids or in a way that interferes with inherent rights, is not improper.

There is no question here of good faith. There is no question of violating a statute. Nor is there one of violating inherent rights. Seniority rights are not inherent rights. They exist solely by virtue of contract.

Any union that represents a large unit of employees, employed in many crafts and classifications, many departments, many plants, in many localities and dif-

ferent circumstances, has the difficult problem of reconciling differences in the interests of many classes and groups. It is in the union's interest as best it may to reconcile these differences, and to accommodate its policies and practices to the differing and sometimes conflicting interests of various classes or groups that comprise the bargaining unit, or who may become members of the unit.

In doing this, it must weigh the effect on itself of what it does that is to the greater or lesser advantage of one group or class as against another; and it must weigh the effect of what it does on the solidarity of the unit and on the bargaining strength that flows from that solidarity. It is interested in holding itself together and in holding to the greatest extent possible the loyalty of all elements of the unit. Bitter dissidence in a small group it may deem more destructive of its solidarity and bargaining strength than mild disappointment in a larger one. By catering to the wishes of one group, it may insure solidarity that enables it to gain greater advantages for the whole unit.

In the absence, at any rate, of a clear showing of fraud or bad faith on the part of the union's bargainers, or of a violation of statutory or inherent rights, what justification is there under the National Labor Relations Act or any other law, or in common sense, for a court or other branch of the Government to substitute its judgment for the union's on what is best for the union as a whole, as the Court of Appeals undertakes to do?

A particular group of employees, such as skilled employees comprising a third of a unit, may feel

strongly that they are entitled to a greater wage increase than other employees. If, in order to retain their loyalty, the union negotiates a 5-cent an hour increase for other employees and an 8-cent an hour increase for them, instead of a 6-cent an hour increase for every one, calling upon the majority to make a sacrifice for the minority, may a court at the instance of an individual or of dissident members of the majority substitute its judgment for that of the union and set aside the contract?

And does an employer who agrees to this arrangement at the instance of an exclusive representative with which the law compels him to deal accede to the union's demands at his peril?

When employers and unions agree to a hundred different wage rates for a hundred different classifications, must they be prepared to prove by some particular method of job evaluation that each rate is in exactly correct relation to all other rates?

If a union negotiates a smaller raise for employees of one company than for those of another, must it be prepared to prove differences between the employees or the companies that justified the different raises?

Petitioners have shown that there are many types of seniority systems, by craft or classifications, by departments, by plants or by companies, and that there are different combinations of these systems, departures from them and exceptions to them.

Courts repeatedly have held it within the power of bargaining representatives to negotiate seniority rules differentiating among employees, and to change

the rules from time to time, notwithstanding that the changes affect for better or worse the then current standing of particular individuals or groups. See: *Aeronautical Industrial District Lodge 727* v. *Campbell, et al.*, 337 U. S. 521 (1949); *Hartley* v. *Brotherhood of Railway and Steamship Clerks, etc.*, 283 Mich. 201, 277 N. W. 885 (1938).

Most seniority systems set up an artificial standard for favoring one employee as against others, substituting the accident of the time when each entered a seniority group for other considerations, even more valid ones, in preferring them. Seniority, by its nature, invariably works in favor of one employee as against another.

In great establishments, there is no system of seniority that in and of itself is naturally or necessarily correct, or that affords an inflexible standard by which to measure the correctness of the system. Seniority is a matter of agreement in the light of the circumstances, and it is changed by agreement from time to time in the light of then existing circumstances. It always involves a precise differentiation of groups and individuals in the light of circumstances at the time.

As the end of World War II approached, unions and employers foresaw the influx into the plants of veterans as new employees as women and elderly people resumed their peacetime pursuits. What considerations led unions to include in their contracts clauses crediting veterans who had not worked for particular employers with standing for seniority from the time they entered the armed forces are not of record. The safest thing to assume is that the unions

did not think it wise to have in the plants cohesive, vocal and dissident minorities of veterans not previously employed whose dissatisfaction with their standing under the seniority rules might disrupt the unions and weaken their bargaining position.

The Selective Training and Service Act (50 U. S. C. App. Sec. 308) assured all veterans who returned to their former employment full seniority credit for time they spent in the armed forces. Whom does the law empower to judge and who, indeed, is best qualified to judge the validity of the claim of non-employee veterans that they, too, should receive seniority credit for all time they spent in the armed services? And whom does the law empower to judge, and who is best qualified to judge, the effect upon the union as a whole of recognizing or denying this claim? As between a court and a bargaining agent that the law says is "exclusive" and whom the employer must recognize as such, we submit that the Court easily comes out second.

The Ruling of the Court Below Makes Collective Bargaining Too Perilous a Practice to Engage In.

The Court of Appeals has in effect held that a union and an employer can agree to differing terms and conditions of employment for various elements of a bargaining unit only if they are prepared to show to the satisfaction of a court, by tangible, objective standards and measurable and measured criteria, that the differing circumstances of each group justified different terms for it, and that the agreement in its entirety was for the benefit of the union as a whole.

The Court below thus ignores the practice of unions to submit their proposed collective agreements to

their members for ratification. In the present case, it was entirely foreseeable that the clause in question would affect adversely the interests of the great majority of Ford's employees, consisting both of employees who were not veterans and employees who had left Ford for the armed services and thereafter returned to work. May a dissident minority, or even a majority of the present employees now, years later, reverse the majority that approved the clause and set aside all that the parties did under it?

If these things are so, the collective bargaining that the law compels becomes a lottery, in which bargainers must await the outcome of trials perhaps years later to know what their agreement was, or a strait-jacket in which one cannot safely agree to any differences, as between different groups, as to the terms of employment. In either case, the collective bargaining that our laws seek to foster becomes a wholly impracticable procedure, not a feasible method of fostering industrial peace.

Huffman and the class he purports to represent, like all other employees, had full opportunity, when the union was considering the clauses in question and when the question of ratification was before it, to present their views and to protect what they considered their interests. They have the right now, through proper procedures within their union, to seek a change in the seniority rules. Or they have the alternative right under the National Labor Relations Act to change their bargaining representative or to vote for no representative.

The "discrimination" of which the Respondents complain is not unlawful under any statutory or case

law. The clause is of a kind that the National Labor Relations Act explicitly gives to unions and employers the right and responsibility to deal with. The Court's interference with the parties' exercise of that right and responsibility would open the door to like interference with the whole process of collective bargaining, and would undermine the system of compulsory collective bargaining that the National Labor Relations Act created.

II.

If, as the Respondents claim, the clause in question is "null and void and invalid", then the employees have no seniority rights.

Seniority rights exist only by reason of a contract. The seniority rights that Ford's employees had before Ford and the Union entered into the clause in question expired when the pre-existing seniority clause expired.

If, as the Respondents contend, the present seniority clause is void (R. 32), then neither the Respondents nor any other employees the clause covers have any seniority rights.

The Court may not assume that, if the petitioners had not created the seniority system we find in their contracts, they would have created another system or the same system that existed under some earlier contract or any other particular kind of system. This Court certainly would be going far if it were to rewrite the seniority clause and impose it on the parties

without their consent, retroactively over a period of six years or more.

This, in effect, is what the Respondents are asking this Court to do.

If this Court should require Ford to revise its seniority roster, pursuant to the Respondents' prayer, all employees who would thereby move up on the seniority lists would have claims, retroactively, for advantages that, under the questioned clauses, have gone to veterans who did not work for Ford before entering the armed forces.

As every existing employee was adversely affected every time a veteran not previously employed by the employer was given seniority pursuant to the clause under attack, the revision of the seniority roster required would be stupendous. In this connection it should be observed that the Court below misconceived the scope of the effect of the clause under consideration. The opinion of the Court of Appeals says (R. 34):

> "The question squarely presented is whether the Union and management can by contract create preferential seniority in men not employed when they entered the armed services as against men, also veterans, who were employed when they entered the armed services."

The fact is that the group adversely affected by the clause consists of all employees, veterans and non-veterans alike, whose positions on the seniority roster were lowered by the insertion of one or more veterans not employed by the employer before entering the service.